No. 109.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

FEDERAL POWER COMMISSION et al.,
Petitioners,

v.

INTERSTATE NATURAL GAS COMPANY,
INCORPORATED, et al.

ANSWER OF SOUTHERN NATURAL GAS COMPANY (INTERVENER) TO PETITION FOR WRIT OF CERTIORARI.

FORNEY JOHNSTON,
First National Building,
Birmingham 3, Alabama,
Attorney for Intervener.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Table of Cases.

Miscellaneous.

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Southern Natural Gas Company, as intervener and one of the distributees under the order herein directing distribution of funds (May 12, 1948. R. pp. 109-112), respectfully represents that the petition for writ of certiorari filed on behalf of the Federal Power Commission presents no substantial question for review, is without merit and should be denied.

THE QUESTIONS ERRONEOUSLY SUGGESTED BY THE PETITION.

The petition for writ of certiorari inaccurately asserts that the Circuit Court of Appeals "considered itself compelled by this Court's decision in *Central States Co. v. City of Muscatine*, 324 U. S. 138, to direct the distribution of the fund to the immediate purchasers from Interstate."

The petition for writ also inaccurately asserts that the questions presented by the Record are (1) whether the *Central States* case compels the distribution ordered, and if so (2) whether the *Central States* case should be re-examined and either modified or disapproved.

It is true that the *Central States* case is cited in the opinion of the Court below and is adequate precedent both on reason and authority for that Court's refusal to undertake the anomalous functions necessary to any distribution of the fund down stream to so-called ultimate consumers; that is, to persons not in privity with Interstate and having no legal right to recover a refund of the excess charges paid by the intermediate pipe lines to Interstate. But wholly aside from the *Central States* case, the order for distribution was compelled by the record. The Court asserted no compulsion based on the *Central States* case.

There is, therefore, no occasion for re-examining the *Central States* case. If there were occasion, there is no substantial basis for questioning the correctness of that decision.

In the Central States case, the pipe line which challenged the rate order of Federal Power Commission in order to obtain a stay gave bond "to secure the refund to purchasers at wholesale of the amounts respectively due them if the Court should sustain the reduction of rates" (324

U. S., at p. 140). No impounding of excess charges was ordered by the Court. After the rates were sustained and the stay was discharged, "Pipeline became liable to make refunds in accordance with the bond." (*ib*). The plaintiff (Natural Gas Pipeline) became threatened with claims from down stream claimants, obtained a stay of suits to that end, paid the total amount of the overcharges into Court and asked the Court to administer that fund. All purchasers from Natural Gas Pipeline acquiesced, *without exception*, in that payment as discharging the obligation of Natural Gas Pipeline to make refund of the overcharge. That is not the situation here.

No pipeline purchaser from Interstate has waived its plenary and vested right to recover the overcharge, regardless of the disposition of the fund ordered impounded in this case. That order was imposed as a condition to the stay granted Interstate and not as an ex parte order limiting the indisputable right of the purchasers from Interstate, who paid the overcharges, to recover them in their own right.

> (In the Central States case, one of the purchasers from the pipeline [Central States] consented in that case to or accepted, with all other purchasers from Pipeline, the payment of the excess into court in lieu of liability on the stay bond but it did not consent that its part of the overcharge should by-pass it and be distributed to or in trust for downstream purchasers. The other purchasers from Pipeline did consent to such downstream distribution. The position of Central States was upheld, subject to such consequences as might attach under State law.)

In the case at bar each purchaser from Interstate has the admitted right (which existed and still exists independently [a] of any bond to secure refund or [b] the

terms of the original ex parte stay order or [c] of any final order for distribution of that fund) to recover from Interstate the amount of overcharges exacted while the rate order was suspended.

If the fund in Court were by-passed and distributed down stream to ultimate consumers having no privity either with Interstate, which exacted the overcharge, or with Southern Natural and the other intermediate pipelines, which paid the overcharges to Interstate and sold the gas downstream to distributing utilities, Interstate would still remain liable by virtue of the Natural Gas Act and general principles of law to its direct privies from whom the overcharge was illegally exacted.

Federal Power Comm. v. Natural Gas Pipeline Co., 315 U. S. 575, 598;
Arkadelphia Mill Co. v. St. Louis S. W. R. Co., 249 U. S. 134;
Annotation, 131 A. L. R., p. 878.

If the Federal Power Commission or any downstream purchaser or ultimate consumer had conceived that Interstate should be required, as a condition to the stay and in addition to Interstate's primary and independent liability to make restitution to those who might pay the overcharge, also to set up a fund for distribution to the 700,000 ultimate consumers having no relation to Interstate, they should by intervention have confronted Interstate with that double exposure and have obtained a bond or stay fund in express terms for their benefit, if, indeed a fund for the reimbursement of 700,000 downstream ultimate consumers or the general public not parties to the rate suspended could have been properly imposed as a condition to the stay. That is a question of future policy or procedure which can not properly be raised by certiorari in this

matter or mooted in this proceeding. It may well be that Interstate would have abandoned the request for stay rather than take the double exposure.

It has not been adjudicated and can not possibly be adjudicated in this proceeding, or assumed in support of the pending petition for certiorari, that any rate for the resale of this gas which Southern Natural (or other pipeline purchaser from Interstate) charged their vendees, or which their vendees (where distributing utilities) in turn charged ultimate consumers, was illegal or excessive. The effect of the petition for writ is to ask this Court either to assume the equivalent of that fallacious hypothesis or else to instruct the Circuit Court of Appeals to enter upon a series of anomalous, expensive and academic hearings to determine whether long past rate schedules of all of these intermediate pipelines were so excessive as to make it inequitable for those lawfully entitled to restitution from Interstate to receive it either from the stay fund or, as implied in the petition, to recover it at all.

This would be an unwarranted assumption or involve the Court below in enormously expensive and extensive academic rate hearings as a predicate for distributing an average of less than $4.00 to each of approximately 700,000 ultimate consumers; covering a period of four and one-half years.

The Federal Power Commission is itself without authority to take retroactive action or require reparation. The Fifth Circuit is wholly without authority in this proceeding to consider any rate structure of Southern Natural as a basis for impairment of the latter's indisputable right to receive restitution of the excess charges illegally exacted from Southern Natural. That restitution is due either from the fund or by plenary suit against Interstate.

The rates which Southern Natural charged its customers (whether fixed or effective under the Natural Gas Act or under State law) were not only lawful, but were, with the exception (in the case of Southern Natural because of its non-utility status as to its direct deliveries) of direct sales to consumers, the only rates which could be lawfully exacted.

The sole questions actually presented by the petition for writ of certiorari are therefore the questions:

(1) Whether this Court will direct the Circuit Court of Appeals to exhaust the impounded fund by distribution to persons admittedly having no legal right to any refund, either from Interstate or its pipeline privies, divert it from the privies of Interstate who paid the overcharge and thus expose Interstate to double liability, and expose Southern Natural (and other purchasers from Interstate) to the necessity of maintaining separate suits against Interstate for recovery of the illegal charges exacted.

(2) Whether the Court will impose on the Circuit Court of Appeals as an incident to its custody of a fund exacted as security, the function of multiple, complicated and synthetic rate hearings foreign to the Court's authority and administrative organization, involving each link between Interstate and the ultimate consumer, to determine whether and to what extent the price received by each link for re-sale of this particular gas was illegal or excessive during a long past refunding period, and to determine who, based on such findings, has the superior moral (but non-justiciable) claim to the fund.

These consequences obviously make the purpose of the petition inappropriate.

The gas purchased by Southern Natural from Interstate was a minor fraction of the gas produced or purchased and transmitted to its market by Southern Natural. Other obvious factors make such a synthetic retroactive rate inquiry wholly impracticable and non-justiciable, for a result which is, as to the 700,000 ultimate consumers, obviously *de minimis*.

The petition for writ of certiorari seeks an unrealistic and impractical result.

SUNDRY REASONS FOR DENYING THE PETITION.

(1) The contention that the economic and therefore the legal incidence of excess rates has passed beyond the privies to the rate and lodged at some point down stream in the mine-to-market process had been rejected before the Interstate Commerce Commission, on Circuit and in State courts for years (Note, 131 A. L. R. 878), when the notion was finally (1918) disavowed in an opinion by Justice Holmes in *Southern Pacific Company v. Darnell-Taenzer Lumber Company*, 245 U. S. 531. The Court in that case approved the Commission's comment on "the endlessness and futility of the effort to follow every transaction to its ultimate result" and held that privity to the rate was essential to right of action for restitution, observing: "Probably in the end, the public pays the damage in most cases of compensated torts." (p. 534). By "public" the Court meant the general public rather than the ultimate party to the rate transaction.

The *Central States* case is based on the case cited. And see *Adams v. Mills*, 286 U. S. 397.

(2) In this proceeding there stand between Interstate, which collected the excess rate, and the general public in the area

—the intermediate pipe lines which paid the illegal exaction;

—in some instances another transmission line;

—a utility distributor—State jurisdiction;

—the ultimate consumer (commercial, manufacturing or domestic)—State jurisdiction.

The ultimate meters totalled approximately 700,000.

The meters in Southern Natural area were:

Industrial	1,959
Commercial	22,175
Domestic	213,637
	237,771

Amount impounded as to all purchasers from Interstate		$2,444,573.00
Average per meter—total	$3.49	
Per annum	.79	
Amount impounded as to Southern Natural (R. p. 52)		575,248.90
Average per meter—total	$2.42	
Per annum	.54	

(3) The overcharges paid by Southern Natural and other intermediate lines to Interstate represent in very large volume gas sold by the intermediate lines direct to private contract customers (industrial consumers) as to which no utility or regulated function is involved. In such instance there is not only no basis for assuming as a

fact that the intermediate pipeline realized excessive return on such business but in the matter of that business the Federal Power Commission had not and could not declare the rate, and no State authority or commission had undertaken to do so.

Where the pipeline has not assumed utility status as to such contracts or deliveries, State authority can not regulate the prices (St. Louis v. Mississippi River Fuel Co., 97 F. [2d] 726; Frost v. R. R. Com., 271 U. S. 577; Michigan Comm. v. Duke, 266 U. S. 57). There is nothing in Panhandle Eastern Pipe Line v. Indiana, 332 U. S. 507, to suggest state power to regulate private contract rates of a non-utility. Panhandle had been declared a utility by the Indiana Court.

(4) Injunction bonds and stay orders can not properly be made to transform remote and speculative economic interests into justiciable causes of action, or to confer rate making powers on the Courts. They certainly can not be so phrased as to defeat the vested right of action to restitution held by those entitled to the reduced rate, who paid for their own sole account the overcharge.

DECISIVE PROPOSITIONS AND AUTHORITIES.

I.

The legal effect of the Natural Gas Act, as construed by approved analogy to the Interstate Commerce Act, is that the rates established pursuant to the Act are the lawful rates which must be applied in settlements for sales of gas subject to the Act; and that refunds of overcharges are payable to the purchaser or shipper who paid them, without respect to the question whether the purchaser or shipper has passed or can pass the final incidence of the overcharge, downstream, to successive pipe lines, distributors, wholesalers, ultimate consumers or the general public.

Central States Electric Co. v. Muscatine, 324 U. S. 138;

Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, per Holmes, J.;

Adams v. Mills, 286 U. S. 397, per Brandeis, J.—

> "In contemplation of law the claim for damages arose at the time the extra charge was paid. * * * No useful end would be served by requiring the joining of 174,000 shippers in this proceeding."

Sec. 4 (a) of the Natural Gas Act [15 U. S. C., Sec. 717 (d)] makes unlawful the collection of any amount in excess of the rate ordered by the Federal Power Commission. Such overcharges are denounced as "illegal exactions."

Federal Power Comm. v. Natural Gas Pipeline Co., 315 U. S. 575, 598.

Southern Natural has accordingly a vested and plenary right to recover the overcharge from Interstate, in its own right, independently of and not arising out of or limited

by any bond or fund or ex parte order of the Court for stay purposes and wholly without respect to the question whether Southern Natural has or has not passed on the burden imposed by the stay.

Arkadelphia Mill Co. v. St. Louis S. W. R. Co.,
249 U. S. 134;
Annotation, 131 A. L. R., p. 878.

Southern Natural's right to recover from Interstate remained plenary and independent regardless of the nature of the conditions imposed on Interstate for the stay or the class of persons, including Southern Natural, for whose benefit the conditions were imposed.

Authorities, supra.

To establish a common-law right to recover an overcharge, a showing of economic compulsion may be necessary, but no such showing or condition is necessary to maintain an action for recovery of an overcharge declared illegal, as here, by statute. However, in this case Southern Natural Gas Company was under compulsion to take gas from Interstate at the excess rate in order to protect its supply contracts from termination, thus meeting the test of compulsion under common-law requirements.

18 L. R. A. (n. s.) 124.

II.

The assumption made by the petitioner that the total reduction which the pipe line privies of Interstate would have received currently, in the absence of stay, would have been immediately passed along, successively, to downstream pipe lines and distributors (municipal and other public utilities) until it reached, intact, the ultimate consumer, is not only speculative and a non sequitur, but is demonstrably erroneous. To entertain the assumption at

all, the Circuit Court of Appeals, in the absence of consent by those entitled to refund of the overcharge, would be compelled to assume the functions both of Federal and State rate commissions and determine after definitive rate hearings involving each step, each pipe line, each distributor and each class of ultimate consumers (industrial, commercial, heating load and domestic) whether or not (a) some commission would have had jurisdiction to pass the reduction along and (b) would, in fact, have ordered and maintained the reduction in effect throughout the period involved, after necessary consideration of each distributor's investment and earnings. That would be rate-making pure and simple. See *Newton v. Consolidated Gas Co.*, 258 U. S. 166, at p. 177.*

In this chain of assumptions there are obvious broken links of regulatory authority due (a) to the absence of regulated utility status in the matter of direct pipeline sales to selected industries, (b) the absence, generally, of power in state regulatory agencies to order reparation or make retroactive findings, absent here with the apparent exception of the State of Illinois, and (c) freedom, generally, of municipal distributors from regulation of their rates.

(a) *City of St. Louis v. Miss. River Fuel Corp.*, 97 Fed. (2d) 726; ib.: 67 Fed. Supp. 549;

(b) As to Illinois, see *Natural Gas Pipeline Case*, 141 Fed. (2d) at p. 30;

As to others, see, e. g., *Central States Electric Case;*

(c) *Springfield Gas & Elec. Co. v. Springfield*, 292 Ill. 236, s. c. 257 U. S. 66—and see 18 A. L. R. at p. 946.

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* "It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate. Rate making is no function of the courts, and should not be attempted, either directly or indirectly."

III.

In imposing conditions for granting a stay the Court might appropriately require a bond to secure the payment of such actionable refund or damages as any party or any privy to the rate or even as any other person might proximately and justiciably sustain as a result of the stay; or might in lieu of bond require deposit in Court of the potential overcharge, for the same purpose.

The Court would have neither jurisdiction in ordering a stay under the Natural Gas Act nor equitable power to require that Southern Natural abandon or impair its right of action against Interstate and look solely to its claims under such bond or to such fund, even if the funds or bonds were adequate and for the sole benefit of Southern Natural.

Such bond or fund might or might not, according to the terms and basis on which it was ordered, constitute additional security protecting Southern Natural's plenary right of recovery against Interstate.

Obviously no power would exist to compel Southern Natural to look solely to a fund created in part for the benefit of some person having no justiciable claim to refund, or to subject its plenary cause of action to the Court's view of the question whether Southern Natural or the Ultimate Consumer has the better social or economic argument for reimbursement.

Analysis of the conditions imposed by the stay order here involved (R. pp. 1-3) indicates intrinsically that by the use of the words "return" and "those having a financial interest in the fund" the Court had in mind persons in privity with Interstate who had, out of their own pockets, paid the excess covered into the fund. They alone paid over moneys to be "returned." Their payments alone had a proximate financial relation to the fund, since

no ultimate consumer paid anything or had any independent justiciable right or interest in the rate or the fund.

The Circuit Court of Appeals, in the discussion preliminary to the issue of the stay order, even before the decision in the Central States Case, refused to limit the fund to ultimate consumers as was then requested by the Commission (according to accounts of the matter, based on the recollection of counsel who were present) and as limited in the stay order in the Panhandle case (infra), and thus refused to commit the Court to the erroneous result unsuccessfully sought in the Central States Case. This indicates that the Circuit Court of Appeals did not intend to misapply the customary objectives of a stay bond or funds by inclusion of speculative or ultimate economic interests as the beneficiaries.

IV.

In the Panhandle stay order (154 F. 2d 909) the Court inadvertently emphasized the ultimate consumer theory and on distribution most of the distributing companies entitled, as privies with Panhandle, to restitution of the overcharge, consented that the Court use its machinery to distribute the fund among "ultimate consumers." The final order as actually entered reversed or ignored the ultimate consumer theory, apparently in accordance with the sound dissent expressed by Judge Riddick, and directed distribution to those having the justiciable right to restitution, leaving ultimate consumers to any recourse they might have against their distributors in suits or proceedings under State laws. See Appendix, Exhibit A, conforming to Judge Riddick's dissent.

The confusion and lack of judicial basis for distribution of a stay fund to ultimate consumers having no privity with the rate, even with the consent of the utilities entitled to the refunds, is demonstrated by the series of

opinions in the matter of the Natural Gas Pipeline refund in the 7th Circuit, which is mentioned below.

The assertion that the Natural Gas Act was devised and adopted for the benefit of ultimate consumers is not only untenable and misleading.

> *Fed. Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591 (603);
>
> *Illinois Nat. Gas Co. v. Pub. Serv. Co.*, 314 U. S. 498, 506.

It involves a basic misconception of the Federal Power Commission's restricted jurisdiction. The ultimate consumer is, from the standpoint of his economic interest in rate making and stay proceedings under the Natural Gas Act indistinguishable from the general public.

> "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted were limited to the regulation of sales in interstate commerce at wholesale." *Central States Electric Case*, 324 U. S. at p. 144.

The intended distribution to ultimate consumers would reduce the formula to the status of de minimis. A large volume of the gas involved goes direct to industries under private contracts at rates not subject to regulation by the Federal Power Commission and not subject to utility regulation by local commissions where the delivering pipeline has not assumed utility status. The residual gas reaching the so-called ultimate consumer would, in Southern Natural's area, represent an average overcharge of materially less than $1.00 a year. This impact would not seem to be sufficient to warrant the novelty of requiring distribution to classes having no legal, equitable or justiciable claim and having so negligible a financial interest.

V.

A stay order purporting to create an equity otherwise non-existent, could not validly ignore, and the initial order here should not be construed (a) as ignoring the primary purpose for imposing terms in ordering a stay, viz., protection of those actually paying the overcharge, and (b) as going further and giving the Court an anomalous contingent fund to distribute gratuitously and arbitrarily in trifling amounts among the 700,000 ultimate consumers having no justiciable interest in the immediate rate reduction and unable to show provable damage resulting proximately from the stay.

The ultimate consumer theory as sought to be applied in this proceeding is obviously unsuited to the revisory functions and organization of the Circuit Court of Appeals, which is definitely forum non conveniens in the matter of impounding and distributing funds through the machinery of an appellate court in millions of trifling amounts.

VI.

Analysis of the Natural Gas Pipeline Refund (128 Fed. [2d] 481, 129 Fed. [2d] 515, 131 Fed. [2d] 137, 134 Fed. [2d] 265, 141 Fed. [2d] 27, 324 U. S. 138). The proceeding in the matter of the Natural Gas Pipe Line Fund demonstrates the confusion, lost motion and administrative detail involved in the effort to rationalize the "ultimate consumer" theory, *even where those who have paid the overcharge consent that distribution may be passed along.*

On July 1, 1942 Natural Gas Pipeline paid into Court the excess (324 U. S. 141) amounting to $6,377,913.52 (131 Fed. [2d] 138) and on September 2, 1942 the Court issued its show-cause order for distribution of the entire fund to elaborately analyzed "eligible consumers," excluding those

who burned gas industrially or commercially or for the purpose of heating, according to no known or conceivable principle (except, presumably, that the Court would not have extended the reduction to those classifications if it were a rate making authority with jurisdiction to readjust the utilities' rates).

Any formula for diversion of the refund from those who paid the overcharges and for its distribution to ultimate consumers not in privity as to the rate or the overcharge, is arbitrary and beyond the jurisdiction or judicial discretion of the court.

VII.

The Panhandle Eastern Fund (Eighth Circuit).

The Eighth Circuit in the matter of the Panhandle Eastern Fund (154 Fed. [2d] 909) directed return of the fund to those immediately and primarily entitled (in that case distributing companies) for adjustment by them with ultimate claimants in accordance with State law. Substantially the same procedure was indicated by the Supreme Court in the *Central States* case, with an interval of delay.

In the case of *Panhandle Eastern v. Fed. Power Comm.*, 324 U. S. 635 (143 Fed. [2d] 488), certain of the distributing companies entitled to the refund disclaimed in favor of their consumers, but the Eighth Circuit did not in its final order undertake to make redistribution to consumers. It left the question of ultimate liability where it belonged, if it belonged anywhere—with the distributors who received refunds, as might be established under state law or by voluntary action.

In that proceeding the stay order had provided for the impounding "for the benefit of the ultimate consumers or of petitioners" (Panhandle and affiliated distributors) "as

in this litigation may be determined entitled thereto." See original stay order entered December 7, 1942, set out in 154 Fed. (2d) 909. Sections 1, 2 and 4 of that order, reflecting the extra-legal position of the Commission, improvidently contemplated that if the reduced rates were sustained, distribution would be to ultimate consumers. The fund reflected overcharges "collected by Panhandle from distribution companies. Most of these distributors * * * have disclaimed any interest in the funds impounded and have agreed that so much of the funds as was derived from the sale of gas to them by Panhandle belongs to their customers." 154 Fed. (2d), at p. 910.

As we have pointed out, the order for distribution as actually entered by the 8th Circuit retreated from this broad suggestion and the comment quoted can not be regarded as a precedent, except in the most general sense (154 Fed. [2d] 910). Judge Riddick's dissenting view clearly prevailed in the final opinion for distribution. See APPENDIX A.

VIII.

Distribution in the Central States Case.

In the *Central States* Case, that intervener was both a direct distributor to consumers and an intervening pipeline which made deliveries to a distributor. Its status as a direct distributor may have raised some question whether state authority had a right to make a retroactive order. That was held to be a question for the State courts. Justice Douglas thought that the distribution of the fund to the local municipalities, in trust for Central to recover it if it could under state law, was a proper disposition. The majority considered that the problem was one for state determination but could not agree that Central States, entitled to the fund so far as the Seventh Circuit

was concerned, should be put to that burden, and made the following observation as the utmost that the Seventh Circuit should require:

> "The most the court below should do, in view of the apparent controversy as to the consumers' right to a refund of rates heretofore paid to Central, is to order that the fund be held for a reasonable time to permit interested persons to litigate the issue in a tribunal having jurisdiction, the order to be conditioned that if such litigation is not instituted within a reasonable time, and prosecuted to final adjudication, the fund shall be paid over to Central, and that if it be adjudged, as a result of such litigation, that Central is indebted to its consumers because of the reduction of wholesale rates in this proceeding, further application may be made to the court as to its disposition." 324 U. S. at pp. 145, 146.

In the case at bar no State authority can possibly have any jurisdiction to make any order of reparation binding on the pipelines or any retroactive or prospective rate binding on their deliveries to distributors.

There is, accordingly, no conceivable reason why the Circuit Court of Appeals should have withheld or be required to withhold the fund from present distribution to the pipelines which paid the overcharge and have a vested right to recover it.

July, 1948.

Respectfully,

FORNEY JOHNSTON,
Attorney for Southern Natural Gas Company, Intervener.

APPENDIX.

EXHIBIT A.

Opinion Authorizing Order Entered October 8, 1946.

United States Circuit Court of Appeals,
Eighth Circuit.

No. 12,466.

Panhandle Eastern Pipe Line Company, a corporation, Illinois Natural Gas Company, a corporation, and Michigan Gas Transmission Corporation, a corporation,
Petitioners,

vs.

Federal Power Commission, City of Detroit, Michigan, County of Wayne, Michigan, Michigan Consolidated Gas Company, a corporation, and Michigan Public Service Commission,
Respondents.

Before Sanborn, Woodrough, and Riddick, Circuit Judges.

Per Curiam:

This Court has been confronted with a conflict of views relative to the disposition of so much of the fund impounded under the stay order of December 7, 1942, as is claimed by distributors. Those who have spoken in the interests of the ultimate consumers have urged this Court to retain that part of the fund in question until the distributors who claim it have established their alleged exclusive rights in state courts of competent jurisdiction. Those representing the distributors contend, in reliance upon the case of Central States Electric Co. v. City of Muscatine,

324 U. S. 138, that so much of the fund as is allocated to the claiming distributors should be turned over to them without further delay and without the imposition of any burdensome conditions.

The stay order of December 7, 1942, which established the impounded fund, provided that the fund should be held "for the benefit of the ultimate consumers or of petitioners (Panhandle Eastern Pipe Line Company) as in this litigation may be determined entitled thereto." The litigation involved the validity of an order of the Federal Power Commission reducing the wholesale rates being charged by Panhandle for gas sold by it to distributors which was resold by them at retail to ultimate consumers. The order of the Commission did not purport to affect retail rates charged by the distributors. No ultimate consumer and no distributor now claiming the right to participate in the fund was, at the time the stay order was entered by this Court, a party to the litigation. As to all who were not parties, the stay order was an ex parte order made to preserve the status quo and to indemnify those who would be injured by the stay of the rate reduction order of the Federal Power Commission if that order was ultimately held to be valid.

While, at the time the stay was granted, this Court evidently assumed that it would be the customers of the distributors who would be injured by the granting of the stay, the Court did not and could not then adjudicate or declare that the fund should belong and be distributable solely to ultimate consumers or to Panhandle. The Court was not attempting, at the time the stay order was entered, to determine who might ultimately be entitled to the fund impounded, nor was it attempting to cut off or affect the legal or equitable rights, in the fund, of those not parties to the litigation. The question before the Court then was whether the application of Panhandle for a stay of the

order of the Commission should be granted, and, if so, what terms and conditions should be imposed upon Panhandle in connection with granting the stay applied for.

From a strict legal standpoint, the fund is made up solely of overcharges in wholesale rates collected by Panhandle from distributors which were required to pay the unreduced wholesale rates during the impounding period. The ultimate consumers of gas furnished by Panhandle to distributors have been prejudiced by the stay order only to the extent that the rates which they paid distributors for the gas during the impounding period exceeded the rates which the consumers would have paid had no stay order been entered. The equities of consumers, therefore, depend upon whether they would have paid less for gas during the impounding period if the reduction in wholesale rates ordered by the Federal Power Commission had become effective in accordance with the terms of the rate reduction order. The distributors which have filed disclaimers of any interest in the impounded fund have, in effect, conceded that, but for the stay order, the reduction in wholesale rates ordered by the Federal Power Commission would have been passed on by such distributors to their customers, and that these customers are therefore exclusively entitled to so much of the impounded fund as was contributed by the disclaiming distributors.

Whether the customers of a distributor which is claiming the exclusive right to a refund of the overcharges paid by it are entitled to have or to share in the contribution which that distributor made to the fund, is, under the ruling of the Supreme Court in the Central States Electric Co. case, supra, a question of state law to be determined by the courts of the state. We think that, prima facie, the contribution of such a distributor is returnable to it.

Our conclusion is that it will be to the advantage of all those who are interested in that portion of the impounded

fund which is claimed by distributors to turn it over to such claimants upon terms and conditions which will protect the rights, if any, of ultimate consumers and will enable them to enforce such rights as they may have against the distributors, in the state courts. These distributors are solvent and the funds in their possession will be as accessible to persons claiming superior rights as the funds would be if retained by this Court. The amount contributed by each such distributor has been definitely ascertained and is not in dispute. Interest on the amounts will not be allowed, since the funds impounded have been invested at less than one per cent interest and this Court has ordered that the earnings of the impounded fund be applied to expenses of distribution.

Appropriate orders will be entered to effectuate the conclusions reached.